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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BARTELL RANCH, LLC, et al.,  
Plaintiffs  
v.  
ESTER M. McCULLOUGH, et al.,  
Defendants  
and  
LITHIUM NEVADA CORP.,  
Defendant-Intervenor.

***Lead Case:***  
**Case No. 3:21-cv-00080-MMD-CLB**

## LITHIUM NEVADA CORP.'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE EDWARD BARTELL'S DECLARATION

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1           Defendant-Intervenor Lithium Nevada Corp. (“Lithium Nevada”) files this Reply in  
 2 support of its motion to strike Paragraphs 13 to 42 of Edward Bartell’s (“Mr. Bartell’s”)  
 3 Declaration, ECF 206 (“Bartell Decl.”), submitted in support of Mr. Bartell’s and Bartell  
 4 Ranch, LLC’s (collectively, “BRL”) motion for summary judgment (“MSJ”). ECF 204.

5           **I. INTRODUCTION**

6           BRL does not substantively respond to Lithium Nevada’s contentions regarding the  
 7 content of Mr. Bartell’s Declaration, and instead attempts to recast the Declaration’s 42  
 8 paragraphs as a lengthy recitation of facts relating to Mr. Bartell’s standing and his efforts to  
 9 administratively exhaust his concerns from the Administrative Record (“AR”). As discussed  
 10 herein, BRL’s citations to the Bartell Declaration in BRL’s MSJ themselves demonstrate  
 11 BRL’s attempt to improperly use extra-record evidence to support substantive arguments  
 12 beyond standing. In addition, the information within Mr. Bartell’s Declaration in Paragraphs  
 13–42 is extra-record because it “elaborates,” or adds to, what is already in the record regarding  
 14 Mr. Bartell’s exhaustion of his complaints.<sup>1</sup> The caselaw cited in Lithium Nevada’s motion  
 15 explained that such repetition of record evidence in a declaration is inappropriate and BRL  
 16 does not contend that the case law is incorrect, conceding the argument. Furthermore,  
 17 exhaustion in an Administrative Procedure Act (“APA”) case is not demonstrated through a  
 18 declaration—it is demonstrated by the record alone, which is why the courts struck declarations  
 19 in the cases that Lithium Nevada cited.

20           BRL additionally does not try to justify the Declaration under any exceptions to the  
 21 record-review requirement, contending that the Declaration should be interpreted by the Court  
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23           <sup>1</sup> Contrary to BRL’s assertions, Lithium Nevada’s motion to strike does not constitute “busy  
 24 work” or an “attempt … to sabotage [the] record.” ECF 236 at 1. Lithium Nevada has not filed  
 25 additional motions to expand the AR in conjunction with its motion for summary judgment, ECF  
 26 207, nor attempted to raise new arguments in its reply briefs. *See, e.g.*, ECF 235. And Lithium  
 27 Nevada has demonstrated that it understands relevant standing principles in the Ninth Circuit.  
 28 As demonstrated herein, contrary to BRL’s conjecture, ECF 236 at 9, Lithium Nevada indeed  
 29 read Mr. Bartell’s declaration prior to filing its 20-page motion to strike which extensively cited  
 30 to specific paragraphs of the declaration. *See United States v. Young*, 470 U.S. 1, 9 (1985)  
 31 (observing that counsel “must not be permitted to make unfounded and inflammatory attacks on  
 32 the opposing advocate,” and where such personal attacks are made that “kind of advocacy … has  
 33 no place in the administration of justice and should neither be permitted nor rewarded”).

1 as only addressing standing. But a Declaration is properly used for standing to make factual  
2 statements that cannot be drawn from the record. It cannot also make legal arguments to  
3 support the standing elements of “causation” and “redressibility.” If BRL could simply submit  
4 a declaration asserting that BLM caused harm to Mr. Bartell by approving the Thacker Pass  
5 Mine (“the Project”), there would no need for MSJ briefs at all—the Court would just decide  
6 whether to accept or reject BRL’s unsupported assertions. That is why declarations are limited  
7 to statements of fact and cannot be used to expand the number of pages in the brief allotted to  
8 the parties to make legal argument. And the argumentative nature of the Declaration is clear—  
9 the challenged Paragraphs 13–42 are only cited (if cited at all) within BRL’s “Argument”  
10 section of its motion. Because BRL does not substantively respond to Lithium Nevada’s  
11 arguments and Mr. Bartell’s Declaration makes legal arguments, not factual assertions, the  
12 challenged Paragraphs 13–42 should be stricken.

## 13                   **II. ARGUMENT**

### 14                   **A.       Mr. Bartell’s Declaration is Extra-Record Evidence.**

15                   BRL contends Lithium Nevada conceded that Mr. Bartell’s Declaration was *not* extra-  
16 record by citing the contention that Mr. Bartell “further elaborate[s] on his comments filed during  
17 the [National Environmental Policy Act (“NEPA”)] process.” ECF 226 at 7. But elaboration  
18 means “the addition of more information to … something that you have said,” meaning the  
19 Declaration included both redundant and inappropriate re-statements of record evidence and also  
20 *additional*, extra-record commentary in a document not logged in the AR. *Elaboration*,  
21 CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/elaboration>  
22 (last visited June 10, 2022). BRL itself does not argue that everything in the Declaration is in  
23 the record, and only protests that “the Bartell Decl. relies *primarily* on evidence already in the  
24 record.” ECF 236 at 5 (emphasis added). But a new non-record document containing additional  
25 commentary *is* extra-record evidence. The extra-record character of the Declaration is evidenced  
26 throughout but most clearly at Paragraph 16, where Mr. Bartell describes his post-Record of  
27 Decision protest hearing before the Nevada State Engineer, which literally is the contents of  
28 BRL’s motion for extra-record evidence. The Declaration is extra record evidence because it

1 impermissibly attempts to add into the record the evidence that it cites. Furthermore, BRL’s  
 2 response to Lithium Nevada’s Motion to Strike does not attempt to justify Paragraphs 13–42 of  
 3 the Declaration under the *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) factors  
 4 and those Paragraphs should be stricken. *Headwaters v. Forsgren*, 219 F. Supp. 2d 1121, 1125  
 5 (D. Or. 2002) (concluding that “[p]ost-decision declarations offered to either justify or attack an  
 6 agency decision already made should not be considered” and striking Declarations “offered for  
 7 [that] purpose … based upon the record already established”).

8 Furthermore, BRL does not respond to Lithium Nevada’s contention that “[w]hen the  
 9 documents plaintiffs seek to include ‘would duplicate and recharacterize matters already in the  
 10 record’ they do not ‘address issues not already there’ and are properly stricken by the Court,”  
 11 regardless of their content. ECF 226 at 7 (quoting *Slockish v. U.S. FHA*, No. 3:08-cv-01169-  
 12 YY, 2020 U.S. Dist. LEXIS 250527, at \*79, 83 (D. Or. Apr. 1, 2020) *aff’d in relevant part*, 2021  
 13 U.S. Dist. LEXIS 32449, at \*4 (D. Or. Feb. 21, 2021)). When a declaration points to record  
 14 documents that it contends “supports [its] position and is argumentative rather than informative,”  
 15 then “the declaration’s contents can be ‘extracted from the record,’ [and] striking the Declaration  
 16 is warranted.” *Ctr. for Sierra Nev. Conservation v. Berry*, 2005 U.S. Dist. LEXIS 55330, at \*25  
 17 (E.D. Cal. Feb. 15, 2005) (citation omitted). BRL concedes this issue, and all paragraphs where  
 18 Mr. Bartell cites to his comments and elaborates should be stricken. See ECF 226 at 8 (citing  
 19 cases); *Robertson v. County of Alameda*, No. 15-cv-03416-TEH, 2015 U.S. Dist. LEXIS 146364,  
 20 at \*6 (N.D. Cal. Oct. 28, 2015) (“Robertson failed to respond to several arguments in  
 21 Defendants’ motion, thus conceding those issues.”).

22 Moreover, each of the challenged paragraphs in Mr. Bartell’s Declaration includes  
 23 additional commentary on the comments included in the record, rather than direct quotes—  
 24 meaning, his elaboration is “extra record.” See e.g., Bartell Decl. ¶ 30(e) (“Piteau asserts … yet  
 25 my hydrologist and I documented .... I informed BLM of this fact in my DEIS Comments”).  
 26 Mr. Bartell also goes beyond describing his prior comments to complaining about the “short  
 27 shrift” given his comments, Bartell Decl. ¶ 17, explaining that his “hydrologist [’s] independent[]  
 28 calculations]” differed from Piteau’s, and asserts an “over 50% decline in Lower Pole Creek.”

1     *Id.* ¶ 23. Mr. Bartell claims he knows that Piteau mischaracterized Lower Pole Creek because  
 2     he both “understand[s] flow patterns” and is “intimately familiar with the flow patterns of Pole  
 3     ... Creek[.]” *Id.* ¶ 24. By pointing to uncited, extra-record evidence and asserting both his own  
 4     and his expert’s authority as evidence to support the same claims made within the Declaration,  
 5     Mr. Bartell attempts to supplement the comments he submitted in the record. His additional  
 6     commentary in Paragraphs 13–42 should be stricken because BRL did not justify the extra-  
 7     record evidence under any exception. *See Sequoia Forest Keeper v. La Price*, 270 F. Supp. 3d  
 8     1182, 1227 (E.D. Cal. 2017) (“These exceptions are to be narrowly construed, and the party  
 9     seeking to admit extra-record evidence initially bears the burden of demonstrating that a relevant  
 10     exception applies.” (citation omitted)).

11                  **B.     Exhaustion is Properly Demonstrated by the AR, Not by Declaration.**

12     BRL contends that “[i]t is common practice in federal courts ... to consider a declaration  
 13     for ... exhaustion purposes,” but cites no relevant APA case. ECF 236 at 5, 9–10. Instead, BRL  
 14     points to two cases addressing a motion “to dismiss ... for failure to exhaust administrative  
 15     remedies in a non-enumerated 12(b) motion,” which allowed the use of declarations to  
 16     demonstrate administrative exhaustion of complaint procedures in prison litigation. *Morris v.*  
 17     *Barra*, No. 10-CV-2642-AJB (BGS), 2012 U.S. Dist. LEXIS 148156, at \*17 (S.D. Cal. Oct. 15,  
 18     2012); *Puente v. County of Los Angeles*, No. CV 07-5809 PSG (FMOx), 2008 U.S. Dist. LEXIS  
 19     139486, at \*14 (C.D. Cal. July 3, 2008) (“In an ‘unenumerated Rule 12(b)’ motion based on  
 20     failure to exhaust administrative remedies, the Court may look beyond the pleadings to decide  
 21     disputed issues of fact.” (quoting *Wyatt v. Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003))).  
 22     While Declarations may be necessary to “describe[] the complaint process in the jail,” *Albino v.*  
 23     *Baca*, 747 F.3d 1162, 1167 (9th Cir. 2014) (en banc) (overturning *Wyatt v. Terhune*, 315 F.3d  
 24     1108 (9th Cir. 2003)), APA litigation reviews the evidence in the AR. This is demonstrated in  
 25     the only APA case BRL cites, wherein a party attempted to “claim[] in his affidavit in support  
 26     of standing that his organization” exhausted its claims. *Methow Forest Watch v. U.S. Forest*  
 27     *Serv.*, 383 F. Supp. 2d 1263, 1268 (D. Or. 2005). The Court declined to address the admissibility  
 28     of the Declaration and instead “dismissed [the party] as a plaintiff” because “*the Administrative*

1     Record does not support this claim.” *Id.* (emphasis added). Exhaustion in an APA case is  
 2 demonstrated through participation in the administrative process as reflected in the AR, not  
 3 through a declaration. *Chilkat Indian Klukwan v. BLM*, 399 F. Supp. 3d 888, 912 (D. Alaska  
 4 2019) (exhaustion requires parties to “structure their participation [during the administrative  
 5 process] so that it … alerts the agency to the parties’ position and contentions,” pointing to  
 6 “Plaintiffs’ comments” as “satisfy[ing] this requirement”).

7                 BRL’s own citations in its MSJ belie BRL’s assertions that it was simply seeking to  
 8 support its standing. BRL cited in its MSJ to the Declaration’s Paragraph 30 as support for its  
 9 argument that BLM did not conduct an independent evaluation of Piteau’s work and instead  
 10 “simply adopted the[] [Piteau’s] surveys.” ECF 204 at 7. But BRL now argues that it was not  
 11 providing evidence for its argument but *impliedly* providing evidence that the argument was  
 12 exhausted, ECF 236 at 7 n.3, even though the sentence in the MSJ citing Paragraph 30 makes no  
 13 reference to exhaustion. BRL also ignores that Paragraph 30 includes many sub-paragraphs that  
 14 are simply argument without references to the record. *See* Bartell Decl. ¶ 30(b), (g), (l), (o), (p).  
 15 In fact, the MSJ does not reference exhaustion at all. *See* ECF 204. Thus, BRL’s assertion that  
 16 the declaration enables it to imply new arguments beyond the text of the MSJ demonstrates BRL  
 17 violated the Court’s ordered page limits by using the declaration as further argument. *Singh v.*  
 18 *Soraya Motor Co.*, No. C17-0287-JCC, 2017 U.S. Dist. LEXIS 178240, at \*11 (W.D. Wash.  
 19 Oct. 26, 2017) (“Declarations should not be used as a vehicle for legal argument.”).

20                 In an APA case, “[c]laims must be raised with sufficient clarity to allow the decision  
 21 maker to understand and rule on the issue raised.” *Idaho Sporting Cong. v. Rittenhouse*, 305  
 22 F.3d 957, 965 (9th Cir. 2002). When evaluating whether a party in a NEPA case “exhaust[ed]  
 23 their administrative remedies,” the Court looks to the “comments on the draft EIS.” *Or. Nat.*  
 24 *Desert Ass’n v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016). As such, the paragraphs where Mr.  
 25 Bartell cites or explains his comments in the record are unnecessary extra-record  
 26 characterizations of his previous comments that should be stricken. *See* ECF 226 at 7 (citing  
 27 Bartell Decl. ¶¶ 15, 17, 30(a), 30(c)–(f), 30(h)–(k), 30(m)–(n), 31–35, 37, 39–40); ECF 236 at 7

1 n.3 (citing Bartell Decl. ¶¶ 15–18, 30–42 as paragraphs cited in the MSJ for exhaustion  
 2 purposes).<sup>2</sup>

3       **C. Standing Declarations May Assert Facts, Not Legal Arguments.**

4       BRL acknowledges that it cited to Mr. Bartell’s Declaration “in the ‘Argument’ section  
 5 of Plaintiffs’ motion for summary judgment,” ECF 236 at 7, but contends that it is Lithium  
 6 Nevada’s “fundamental fail[ure] to understand the *legal* requirements of … standing” that leads  
 7 to the presumption that those portions of the Declaration are unrelated to standing. *Id.* at 9  
 8 (emphasis added). Lithium Nevada acknowledged that a declaration could be considered relative  
 9 to standing only and, therefore, did not seek to strike Paragraphs 1–12 of Mr. Bartell’s  
 10 Declaration that could be considered relative to standing. BRL repeats throughout its motion  
 11 that the Declaration simply addresses the three elements of standing—*injury in fact, causation,*  
 12 and *redressibility*. *Id.* at 10–20. Lithium Nevada acknowledges that Paragraphs 1–12 set forth  
 13 facts that Mr. Bartell points to in his MSJ to demonstrate the injury he believes will result and  
 14 that those paragraphs are appropriate in a standing Declaration. But a Declaration may only be  
 15 used to “set forth … specific facts” to “establish[] that [the party] has suffered an injury in fact.”  
 16 *Beck v. U.S Dep’t of Commerce*, 982 F.2d 1332, 1340 (9th Cir. 1992); *see also Lujan v. Defs. of*  
 17 *Wildlife*, 504 U.S. 555, 563 (1992) (noting “respondents had to submit affidavits or other  
 18 evidence showing, through specific facts … that one or more of respondents’ members would  
 19 thereby be ‘directly’ affected”). Where a “statement is argumentative” it is not appropriately  
 20 considered a statement of fact and is inappropriate in a declaration. *Cf. Hells Canyon Pres.*  
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22       <sup>2</sup> BRL contends Mr. Bartell made statements relating to exhaustion in an attempt address Lithium  
 23 Nevada’s Answer to the Complaint, which contended that “[s]ome or all of Plaintiffs’ claims are  
 24 barred because they failed to exhaust administrative remedies.” ECF 21 at 14. But again,  
 25 actually addressing that argument requires BRL to point to evidence in the AR that BRL  
 26 exhausted its remedies. Furthermore, Lithium Nevada does not dispute that BRL exhausted the  
 27 claims made in Mr. Bartell’s DEIS comments, which are the large majority of the comments  
 28 cited in the Declaration. But crucially, the paragraphs in the Declaration that only cite to Mr.  
 Bartell’s post-FEIS comments do not establish that Mr. Bartell exhausted those issues, but rather  
 demonstrate that Mr. Bartell continued to make comments after the public comment period  
 concluded. Mr. Bartell did not exhaust those post-FEIS claims simply by repeating them in a  
 declaration, because exhaustion in APA cases can only be shown through record evidence and  
 comments timely raised for BLM’s consideration prior to the FEIS—not those raised for the first  
 time following completion of the FEIS.

1     *Council v. Jacoby*, 9 F. Supp. 2d 1216, 1230 n.22 (D. Or. 1998) (striking from a statement of  
 2 facts as argumentative the phrase “The FHWA has refused to prepare an environmental  
 3 assessment or environmental impact statement for the project....”).

4                 The Court should strike all portions of Mr. Bartell’s Declaration that do not pertain to  
 5 attempts to provide facts relevant to Mr. Bartell’s standing. The “Standing” section of BRL’s  
 6 MSJ almost entirely relies only on Paragraphs 1–12 of Mr. Bartell’s Declaration, and Lithium  
 7 Nevada did not seek to strike those Paragraphs. *See ECF 204 at 3–7* (citing Bartell. Decl. ¶¶ 1–  
 8 12).<sup>3</sup> BRL’s own citations in its MSJ perhaps demonstrate best that BRL attempts to use  
 9 Paragraphs 13–42 as improper extra-record evidence to try to support substantive MSJ  
 10 arguments. BRL does not specifically cite to the contents Paragraphs 13–42 in support of its  
 11 standing claims within the “Standing” section of the MSJ. Instead, the only specific references  
 12 to Paragraphs 13–42 occur, often as the sole support for sentences describing BRL’s NEPA and  
 13 FLMPA claims, within the “Argument” section of BRL’s brief. *See id.* at 13–14, 18–19, 23–24,  
 14 27, 30, 34, 36, 38–40.

15                 BRL contends that any time it cited to the Declaration in the Argument section it simply  
 16 “cited to the Bartell Decl. instead of record evidence because Declarations are properly used to  
 17 establish standing.” ECF 236 at 8 n.4. But BRL relied solely on the Declaration as evidence to  
 18 support its legal contentions regarding BLM’s process, its decision, and the impact of the  
 19 decision—legal arguments under an APA claim. Mr. Bartell’s Declaration claims that BLM  
 20 conducted a “hasty, shortsighted, ignorant, and wanting ‘environmental review,’” ECF 204 at 13  
 21 (citing only Bartell Decl. ¶¶ 22–42), that BLM “vastly undermeasured springs,” *id.* at 14 (citing  
 22 only “*See generally* Bartell Decl.”); and again that “Piteau deliberately and consistently  
 23 mismeasured springs,” *id.* at 23 (citing only “Bartell Decl. ¶¶ 1–30). BRL never specifically  
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25                 <sup>3</sup> There is a single citation to a sentence within a later Declaration paragraph asserting that,  
 26 among other arguments, any “pollution will adversely affect ... enjoyment of ... public and  
 27 private lands.” ECF 204 at 5 (citing Bartell Decl. ¶ 27). But the sentence before explains that  
 28 the pollution referenced relates to Mr. Bartell’s Declaration-only claims that “air, water, light or  
 noise pollution will” result from the Project. Bartell Decl. ¶ 27. In context, this paragraph makes  
 new arguments that are not discussed in the MSJ, *see infra* Section II.C., and should still be  
 stricken, notwithstanding BRL’s attempt to cite to it as evidence of standing.

1 cites to Paragraphs 14–17 in its MSJ, further demonstrating that those Paragraphs are  
 2 unnecessary and argumentative. Where BRL cited the Declaration in support of argument  
 3 statements, those statements had nothing to do with standing or exhaustion. Instead, the MSJ  
 4 attempts to rely on the contentions in the Declaration as further evidence to support BRL’s NEPA  
 5 and FLPMA claims, not to justify BRL’s standing to bring those claims.<sup>4</sup> The Declaration  
 6 therefore “*does make [] arguments*” and intentionally “*is ... offered to support the merits of*  
 7 *Plaintiffs’ brief,*” contrary to BRL’s protestations. ECF 236 at 8 n.5 (emphasis added).

8 BRL’s detailed examination of the Declaration further demonstrates the argumentative  
 9 nature of the Declaration. BRL admits that Paragraph 13 “is not particularly necessary,” and  
 10 does not pertain to standing, meaning it should be stricken. *Id.* at 12. Paragraph 14 newly  
 11 contends that the Project will prevent Mr. Bartell’s “ability to access and enjoy [his] own private  
 12 lands and grazing allotments,” an access claim that does not appear in the MSJ. Bartell Decl.  
 13 ¶ 14; *see generally* ECF 204. BRL acknowledges that Paragraphs 15–17 simply chronicle, with  
 14 new commentary, “Mr. Bartell’s extensive participation in the NEPA process,” which is extra-  
 15 record and unnecessary. *Citizens for a Better Way v. U.S. DOI*, No. 2:12-cv-3021-TLN-AC,  
 16 2015 U.S. Dist. LEXIS 78705, at \*15–16 (E.D. Cal. June 16, 2015) (striking a Declaration where  
 17 the substance of the Declaration was already included in comments within the record because  
 18 agency “has already taken this into consideration”). Where BRL argues Paragraphs 18–29  
 19 “establish how the [Project] will injure [its] various interests,” ECF 236 at 13, the Declaration  
 20 continues to add to the MSJ’s claims that the Project “may ... destroy habitat” by making new  
 21 claims regarding “light ... pollution,” Bartell Decl. ¶ 18; that BRL “will be affected by ... guard  
 22 shacks, weather stations, and fencing,” *id.* ¶ 19, which is not mentioned in the MSJ, ECF 204;

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23 <sup>4</sup> BRL additionally cites to the Declaration as part of string cites of evidence to support other  
 24 arguments unrelated to standing or exhaustion. *See* ECF 204 at 18 n.11 (claiming “the quantity  
 25 of imported sulfur was kept hidden,” citing “TPEIS-0429; Bartell Decl. ¶ 39”); *id.* at 18–19  
 26 (averring “BLM failed to provide the mitigation plan,” citing “TPEIS-0443; TPEIS-0484; Bartell  
 27 Decl. ¶¶ 35, 39”); *id.* at 37–38 (contending “[t]he errors in the baseline prevent BLM from  
 28 effectively mitigating the Mine’s impacts,” citing “ONDA v. Jewell, 840 F.3d at 571; *see generally* Bartell Decl.”). None of these statements imply that the citation to the Declaration  
 incorporated a standing or exhaustion argument, rather the declaration is treated just like record  
 evidence—even though BRL persists in claiming it does not need to justify inclusion of the  
 Declaration in the record. ECF 236 at 5.

1 pointing to uncited evidence from Mr. Bartell’s hydrologist, Bartell Decl. ¶ 23; contending the  
2 Project will “destroy … big game habitat,” *id.* ¶ 24, not cited in the MSJ, ECF 204 at 36, expands  
3 on new claims of air, light, and noise pollution, *id.* ¶¶ 25–27; uncited claims of effects to water  
4 levels on an unnamed well, *id.* ¶ 28; and concludes with the legal argument that BLM’s  
5 “shortcuts” resulted in a legally insufficient FEIS, *id.* ¶ 29. These new claims combined with  
6 legal contentions regarding the sufficiency of the FEIS constitute extra-record evidence that Mr.  
7 Bartell uses in the Declaration to make new arguments in addition to those made in the MSJ.  
8 Therefore, they are improper and should be stricken.

9 BRL objects that the MSJ did make arguments regarding air, light, and noise pollution,  
10 but the cited material does not support the belated claims. Mr. Bartell made one DEIS comment  
11 regarding noise and it was unrelated to sage grouse, solely regarding “[value] of Mr. Bartell’s  
12 “private property” that was not repeated in the MSJ. TEPIS-01489 at AR-106750 (“The final  
13 EIS must include mitigation to private property owners if, in fact, plant odors and noise reaches  
14 private property and devalues it.”). BRL proposes that its Visual Resource Management  
15 (“VRM”) claim within the MSJ encompassed Mr. Bartell’s statements about light and air  
16 pollution, but “[t]he process for analyzing impacts to visual resources involves … using the basic  
17 design elements of form, line, color, and texture.” TPEIS-0384 at AR-045647. While light  
18 impact discussions are included in the record, BRL did not mention light impacts in either the  
19 MSJ or in comments on the DEIS. TPEIS-1489 at AR-106756 (general argument regarding  
20 VRM classification with no reference to light); ECF 204 at 39 (same). And lastly, claims  
21 regarding air pollution do not fall under VRM designations but are separately evaluated under  
22 the FEIS’s environmental impacts section. TPEIS-0384 at AR-045841–42. BRL does not raise  
23 air quality claims in its MSJ. *See generally* ECF 204. Thus, the paragraphs within Mr. Bartell’s  
24 Declaration that make *new* arguments in addition to the MSJ should be stricken as argumentative  
25 and exceeding the allotted page limit. Bartell Decl. ¶¶ 18, 25–27.

26 Where the remainder of the Declaration makes statements related to arguments that *are*  
27 included in the MSJ, Bartell Decl. ¶¶ 20–21, 30–42, they are unnecessary for standing and simply  
28 argue BRL should win the substantive claims in its MSJ. Parties must make legal arguments

1 within the Court-allotted number of pages for their MSJ and, in an APA case, support the  
2 arguments with reference to evidence in the AR. BRL cannot use Mr. Bartell's Declaration to  
3 make its *legal argument* regarding standing, it may only provide facts relevant to standing that  
4 are not obtainable from the AR. Thus, Paragraphs 13–42 “should be stricken as improper legal  
5 argument outside the court-approved page limit” because BRL’s Declaration, “while couched in  
6 factual assertions, contains significant argument regarding why several of [BLM or Lithium  
7 Nevada’s] assertions are erroneous. Such argument goes beyond what is appropriate for a  
8 Declaration.” *Moussouris v. Microsoft Corp.*, No. C15-1483JLR, 2018 U.S. Dist. LEXIS  
9 112792, at \*33–34 (W.D. Wash. June 25, 2018). Paragraphs 13–42 make arguments, not factual  
10 statements, that clearly address the merits of BRL’s NEPA and FLPMA claims. *See, e.g.*, Bartell  
11 Decl. ¶ 24 (asserting “BLM and LNC … mischaracterize[ed] these lower stream reaches as  
12 ephemeral instead of intermittent,” relating to his NEPA claim); *id.* ¶ 37 (claiming Lithium  
13 Nevada did not demonstrate the required “discovery of valuable minerals,” relating to his  
14 FLMMA claim). And because “[d]eclarations . . . should not be used to make an end-run around  
15 the page limitations . . . by including legal arguments outside of the briefs,” *King County v.*  
16 *Rasmussen*, 299 F.3d 1077, 1082 (9th Cir. 2002), the Court should strike those paragraphs of the  
17 Declaration.

18       **D.     BRL Concedes the Arguments it Does Not Address.**

19       BRL agrees that Mr. Bartell’s paragraphs making arguments concerning BLM’s  
20 scientific methods and data cannot be used to challenge those methods and data. ECF 236 at 6  
21 (“The Court need not consider the Bartell Decl. for any independent evidentiary value outside  
22 standing and exhaustion purposes.”). This concedes Lithium Nevada’s argument that any aspect  
23 of the Declaration “target[ing] the [agency’s] science” is improper and should be stricken. *Native*  
24 *Ecosystems Council v. Erickson*, 330 F. Supp. 3d 1218, 1231 (D. Mont. 2018). BRL also  
25 concedes that the Declaration attempts to repeat and rephrase record evidence, suggesting that it  
26 “could replace citations to the Bartell Decl. with citations to the record without changing the  
27 substance of the pleading at all.” ECF 236 at 7–8. This concedes Lithium Nevada’s argument  
28 that challenged portions of the Declaration are “redundant and unnecessary” and should be

1 stricken. *Front Range Equine Rescue v. BLM*, No. 3:16-cv-149-AC, 2017 U.S. Dist. LEXIS  
 2 62842, at \*13 (D. Or. Mar. 13, 2017). And where the Declaration makes legal arguments  
 3 (whether arguments regarding the legal elements of standing or other legal burdens considered  
 4 on summary judgment), the Declaration goes beyond the Court-ordered page limits and should  
 5 be stricken under the Court’s “inherent authority to strike [a] fugitive document.” *Mazzeo v.*  
 6 *Gibbons*, 2010 U.S. Dist. LEXIS 105798, at \*9 (D. Nev. Sept. 30, 2010). BRL does not contest  
 7 any of these arguments directly and simply tries to change the character of the words already on  
 8 the page. Where arguments are not contested they are conceded, *Robertson*, 2015 U.S. Dist.  
 9 LEXIS 146364, at \*6, and in light of the argumentative character of the Declaration being clear  
 10 through BRL’s use of the Declaration in the MSJ, this Court should strike the offending  
 11 Paragraphs 13–42.<sup>5</sup>

### 12                   III. CONCLUSION

13                   The “district court[] [has] inherent power over the administration of its business, which  
 14 includes the “inherent authority to strike [a] fugitive document.” *Mazzeo*, 2010 U.S. Dist.  
 15 LEXIS 105798, at \*8–9 (citation omitted). The non-standing paragraphs of Mr. Bartell’s  
 16 Declaration improperly attempt to increase BRL’s number of pages allotted for its summary  
 17 judgment motion, and are inadmissible under *Lands Council*. As such, Mr. Bartell’s  
 18 argumentative paragraphs within his Declaration addressing the BLM’s decision “are not  
 19 appropriately before the Court and, therefore, are fugitive documents that [should] be struck.”  
 20 *Johnson v. Holmes*, No. 2:18-cv-00647-GMN-EJY, 2020 U.S. Dist. LEXIS 104074, at \*4 (D.  
 21 Nev. June 12, 2020). For all these reasons, Paragraphs 13 to 42 in Mr. Bartell’s Declaration  
 22  
 23

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24                   <sup>5</sup> Were the Court to take BRL’s suggestion to limit consideration of the Declaration to only  
 25 standing and exhaustion, ECF 236 at 7, Lithium Nevada would continue to object that exhaustion  
 26 is not properly supported by declaration in APA cases and that legal arguments that could be  
 27 construed as relating to standing in the Declaration still inappropriately expand BRL’s allotted  
 28 pages for argument. The only appropriate course of action is to strike the offending Paragraphs  
 13–42 and strike references to them in the MSJ. BRL should also not be allowed to additionally  
 edit the citations in their MSJ. *Id.* at 7–8. If BRL felt that it needed evidentiary support for  
 arguments in the Argument section of the brief, it should have cited to record evidence, per the  
 APA.

1 in support of BRL's motion for summary judgment do not pertain to his standing and should  
2 be stricken.

3 Dated: June 17, 2022.  
4

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2022, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/ *Laura K. Granier*  
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